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8  
9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
10 **COUNTY OF SANTA CLARA**

11  
12 THE PEOPLE OF THE STATE OF  
CALIFORNIA on the RELATION of SAN  
13 JOSE POLICE OFFICERS' ASSOCIATION,

14 *Plaintiff,*

15 v.

16 CITY OF SAN JOSE, and CITY COUNCIL  
OF SAN JOSE,

17 *Defendants.*

CASE NO. 113-CV-245503

**MEMORANDUM IN SUPPORT OF  
MOTION TO VACATE JUDGMENT AND  
FOR FURTHER TRIAL OR NEW TRIAL  
[CCP § 657, ET SEQ. AND CRC RULE  
3.1600]**

DATE: May 17, 2016

TIME: 9:00 a.m.

DEPT: 7

JUDGE: Hon. Beth McGowen

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1 **I. INTRODUCTION.**

2 Consistent with the Court’s duty to jealously guard the constitutional initiative power, this  
3 case cries out for a trial. The City of San Jose lacked authority to stipulate to the invalidation of  
4 Measure B, a provision of the City’s Charter duly enacted by the voters taking back from the City  
5 Council authority over the City’s pension system. Any other conclusion would destroy the  
6 constitutional initiative and charter amendment rights of San Jose voters. “Voter initiatives have been  
7 compared to a “legislative battering ram” because they “may be used to tear through the  
8 exasperating tangle of the traditional legislative procedure and strike directly toward the desired  
9 end.”” (*Tuolumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029, 1035.)  
10 “In light of the initiative power’s significance in our democracy, courts have a duty “to jealously  
11 guard this right of the people” and must preserve the use of an initiative if doubts can be reasonably  
12 resolved in its favor.” (*Id.*, citing *Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18  
13 Cal.3d 582, 591; *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22  
14 Cal.3d 208, 248.) Allowing the City to deflect the legislative force of an initiative charter amendment  
15 by stipulating to its invalidity with the initiative’s opponents completely disarms the voters.

16 In a classic “backroom deal” to hide its actions from voters seeking to intervene to defend  
17 Measure B, the City, in violation of the Ralph M. Brown Act (Gov’t Code §§ 54950 *et seq.*), signed  
18 a stipulation that Measure B was not properly enacted, and *ex parte* secured the Court’s signature on  
19 a stipulated judgment. The stipulations of the Parties are contrary to the evidence in this case, and the  
20 stipulated judgment is inconsistent with both. In addition, “[t]he trial court has the duty to ensure that  
21 the stipulated judgment is just and cannot act as a mere puppet.” (*Plaza Hollister Hotel v. County of*  
22 *San Benito* (1999) 72 Cal.App.4th 1, 13.) “[A] court ‘may reject a stipulation that is contrary to public  
23 policy [citation], or one that incorporates an erroneous rule of law’ [citation].” (*Id.*, citing *California*  
24 *State Auto. Assn. Inter-Ins. Bureau v. Superior Court* (1990) 50 Cal.3d 658, 664.) In this case, the  
25 Court was deprived of its ability to perform these duties, including the duty to jealously guard the  
26 voters’ initiative power, because the Parties contrived that the voters not be represented in the action.  
27 Then the Parties failed to inform the Court of the City’s duty to enforce and defend Measure B, and  
28 of the Court’s obligation to “jealously guard” and “preserve Measure B”, if reasonably possible.

1 Whether Measure B should be repealed is a question for this Court after a trial at which it is fairly  
2 defended, or the voters of San Jose, not for the City in collaboration with Measure B opponents.

3 Intervenor is entitled to a fair trial on the bases set forth in their Notice of Intent, and below.  
4 The prejudice to Intervenor from these causes is patent: an improper and erroneous stipulated  
5 judgment was entered nullifying Measure B and wiping away voters' exercise of their Constitutional  
6 initiative and First Amendment rights; control of the City's pension system accorded to San Jose  
7 voters by Measure B was wrested from them; Intervenor was denied their right to defend Measure  
8 B; and Intervenor Constant was deprived of the protections of Measure B. The stipulated judgment  
9 should be vacated and a new trial granted. Alternatively, San Jose voters have a constitutional right  
10 to vote to repeal and replace Measure B.

11 **II. MEASURE B.**

12 A. Voter Enactment of Charter Amendment Measure B.

13 San Jose is a charter city. California Constitution article XI, section 3(a), provides, in part:  
14 "For its own government, a county or city may adopt a charter by majority vote of its electors voting  
15 on the question. The charter is effective when filed with the Secretary of State. A charter may be  
16 amended, revised, or repealed in the same manner. A charter, amendment, revision, or repeal thereof  
17 shall be published in the official state statutes." (Emphasis added.) It is "'self-evident that the  
18 legislature itself could not abridge nor even hamper the exercise of those powers'. (*Brown v. Boyd*  
19 (1939) 33 Cal.App.2d 416, 421, quoting *Hill v. Board of Supervisors* (1917) 176 Cal. 84, 86.)

20 Beginning in 2008, the City of San Jose faced a budget crisis driven in large part by rising  
21 costs for employee retirement benefits. In response, the City adopted a fiscal reform program that  
22 called for a variety of cost reduction measures, including a possible charter amendment concerning  
23 employee retirement benefits. (Statement of Decision in *San Jose Police Officers' Association v. City*  
24 *of San Jose*, Santa Clara Superior Court No. 1-12-CV 225296, pp. 2-3 ("Consolidated Cases").)

25 The Meyers-Milias-Brown Act ("MMBA") obligates local agency employers to meet and  
26 confer over proposed charter amendments that would directly impact terms and conditions of  
27 employment for their employees. (*People ex rel. Seal Beach Police Officers Assn. v. City of Seal*  
28 *Beach* (1984) 36 Cal.3d 591.) Prior to the placement of Measure B on the ballot, "[t]he undisputed

1 facts demonstrate that the City engaged in extended and exhaustive bargaining with [Relator] SJPOA  
2 for many months, up to impasse, and continued to meet its obligations by participating in mediation  
3 and discussions with SJPOA for many more months. Indeed, the parties met on 13 occasions for  
4 bargaining, participated in eight additional mediation and bargaining sessions, and the City submitted  
5 at least 3 ballot proposals before finally placing Measure B on the ballot.” (City’s Memo IOT  
6 SJPOA’s App. for Leave to Sue in *Quo Warranto*, pp. 7-8; Decl. of Gurza IOT SJPOA’s App. for  
7 Leave to Sue in *Quo Warranto*; City’s Statement of Undisputed Facts IOT SJPOA’s App. for Leave  
8 to Sue in *Quo Warranto*, RJN, Ex.s 13, 15, &14; Decl of Sakai ISO Oppo. to App. For Stay, ¶ 4.)

9 On March 6, 2012, after months of negotiations from June 2011 through February or March  
10 2012, the City Council voted to place Measure B on the June 5, 2012 ballot. (City’s Statement of  
11 Undisputed Facts IOT SJPOA’s App. For Leave to Sue in *Quo Warranto*, RJN Ex. 14; Decl. of Sakai,  
12 ¶ 4.) The voters of San Jose, by an overwhelming majority, approved the charter amendment, thus  
13 taking back control of the City’s pension system. In addition to imposing several pension cost  
14 containment provisions, Measure B empowered San Jose voters to approve “any change in matters  
15 related to pension and other post-employment benefits,” and required voter approval for any increases  
16 to pension or particular retiree health care benefits. (San Jose City Charter, Article XV-A, § 1504-A;  
17 Supp. Decl. of Constant, ¶ 6.) Measure B was also designed to protect the City’s employees, residents,  
18 and voters by ensuring that the “City can provide reasonable and sustainable post-employment  
19 benefits while at the same time delivering Essential City Services to the residents of San Jose.” (San  
20 Jose City Charter, Article XV-A, § 1502-A.)

21 B. Subsequent Litigation.

22 On or about June 21, 2012, Relator filed an Application for Leave to Sue in *Quo Warranto*  
23 with the California Attorney General. In April 2013, the Attorney General granted Relator leave to  
24 file this action in *Quo Warranto*, concluding, “Leave to sue is GRANTED to determine whether the  
25 City of San Jose fulfilled its statutory collective bargaining obligations before placing an initiative  
26 measure on the June 2012 ballot that, after its passage, amended the City Charter so as to increase  
27 city police officers’ retirement contributions and reduce their retirement benefits.” (Att’y Gen. Op.  
28 12-605 (April 15, 2013), p. 1) Thereafter, the complaint in this action was filed on April 29, 2013;

1 the City answered on June 28, 2013, denying all material allegations and asserting its affirmative  
2 defenses. Since then, there have been no evidentiary hearings or motions before this Court.

3 In the meantime, six sets of plaintiffs filed actions challenging 11 sections of Measure B. The  
4 City prevailed on most of the claims. (Consolidated Cases.) Appeals are still pending. In addition,  
5 several unions filed Unfair Practices Charges with PERB that are stayed. (Decl. of Platten.)

6 C. 2014 Mayoral Election and Collaboration to Repeal Measure B Without a Vote.

7 In November 2014, the general municipal election occurred in San Jose. Then-city council  
8 member, Sam Liccardo, who voted to place Measure B on the June 2012 ballot and was a staunch  
9 supporter, campaigned for Mayor in part on a platform supporting vigorous defense of Measure B.  
10 (Decl. of Constant, ¶ 14.) Council Member Liccardo was elected Mayor. Then, despite campaign  
11 promises to defend Measure B, in a March 11, 2015 letter to the City’s unions, the City proposed an  
12 undefined “*quo warranto* strategy... that can be carried out on a timeline that would allow the Council  
13 sufficient time to pursue a 2016 ballot measure.” (City RJN, Ex. G, p. 2.) On July 24, 2015, when  
14 the City publicized an outline of the Settlement Framework with its police and firefighter unions, it  
15 reconfirmed the commitments to a cryptic “*quo warranto* strategy” and a 2016 ballot measure. (City  
16 RJN, Ex. H, pp. 12-13 of 14.) On August 17, the City publicized two addenda to the Settlement  
17 Framework setting forth an implementation path. The City stated that the *Quo Warranto* process had  
18 not yet been initiated, many contingencies remained, but the Parties proposed “using the SJPOA *quo*  
19 *warranto* case to immediately implement the agreed-upon changes to retirement benefits and pursuing  
20 a November 2016 ballot measure.” (City RJN, Ex. J, p. 1.) Addendum #1 set forth the Parties’  
21 general agreement there would be a ballot measure to “supersede Measure B”. The second addendum  
22 set forth a timeline. The City’s August 17, 2015 memorandum states “the parties will propose a  
23 Stipulated Judgment in the *quo warranto* case that Measure B should be invalidated”, but prior to that  
24 “the parties will propose a stipulation to stay the implementation of Measure B while the other items  
25 in the implementation process are proceeding”, which included the November 2016 ballot measure  
26 to supersede Measure B. (City RJN, Ex. J, p. 2 & Add. #2, Item #5.)

27 As recently as February 24, 2016, the City was promising: “Once a global settlement is  
28 reached and before the *quo warranto* process begins in court, ... the parties will agree on ballot

1 measure language for November 2016.” (RJN, Ex. 9, p. 1.) The memo also stated, however: “The  
2 parties will agree upon and submit a factual stipulation and stipulated judgment in the *quo warranto*  
3 case finding that Measure B is invalid.” (*Ibid.*) The language regarding the proposed measure to  
4 “supersede Measure B” no longer appears. Intervenors filed their application shortly thereafter.

5 **III. RECENT PROCEDURAL BACKGROUND IN THIS COURT.**

6 Proposed Intervenor Constant informed the City’s Mayor by telephone of his intent to seek  
7 intervention in this action to defend Measure B on March 7, 2016, just 11 days after the February 24,  
8 2016 memorandum mentioned above. (Supp. Decl. of Constant, ¶ 3; 2<sup>nd</sup> Decl. of Leoni, ¶ 4.)  
9 Immediately thereafter, on March 8, 2016, the City, unbeknownst to Intervenors, or any member of  
10 the public for that matter (because the matter was not publicly reported in compliance with the Brown  
11 Act; Decl. of Sakai, ¶5), accepted and signed proposed stipulations of facts, findings and conclusions,  
12 offered by Relator and the Attorney General along with a form of judgment that completely  
13 invalidated Measure B. (2<sup>nd</sup> Decl. Leoni, ¶¶ 5-6; Decl. of Sakai, ¶ 5; Decl. of Adam IOT App. For  
14 Stay, ¶2.) Intervenors filed their application to intervene on March 9, 2016. Completely disregarding  
15 Intervenors’ filing, the Parties secured *ex parte* the signature of this Court on their proposed judgment  
16 on March 15, 2016. (2<sup>nd</sup> Decl. Leoni, ¶ 15; Decl. of Adam, ¶ 2.)

17 The Parties and Intervenors appeared before the Court the next day to set a briefing schedule  
18 and hearing date on the application for intervention. (Decl. of Carson ISO *Ex Parte Application* (“4th  
19 Decl. of Carson”), ¶ 3; Decl. of Shamos ISO Motions to Vacate (“2nd Decl. of Shamos), ¶¶ 5-6.) The  
20 Parties and Intervenors also agreed to continue a Case Management Conference on judgment  
21 scheduled for March 24, 2016, to April 5, 2016, simultaneously with the hearing on Intervenors’  
22 application, but they did not tell Intervenors they had already submitted a stipulated judgment to the  
23 Court. (4th Decl. of Carson, ¶ 3.) The Parties filed their opposition briefs to Intervenors’ Application  
24 to Intervene on March 23, 2016, crowing the case was settled and documents were with the Court,  
25 but not serving their stipulations with their oppositions. (2<sup>nd</sup> Decl. Leoni, ¶¶ 8-9.) At the hearing on  
26 April 5, 2016, the Court informed Proposed Intervenors for the first time the judgment had been  
27 signed. The Court later denied the application to intervene. (2<sup>nd</sup> Decl. Leoni, ¶ 13.)

28

1 A set forth in exquisite detail in the Memorandum of Intervenors Haug and Silicon Valley  
2 Taxpayers' Association, which Intervenor Constant fully supports and incorporates, the stipulations  
3 submitted to this Court are inconsistent in material particulars with previous pleadings and sworn  
4 declarations filed by the City. In its opposition to the Relator's application to the Attorney General  
5 for leave to sue in *Quo Warranto* and in its Answer to the Complaint in this action, the City, supported  
6 by sworn judicial admissions, vehemently denied violating the MMBA, reciting line and verse it's  
7 diligent and good faith compliance. Of utmost significance to the issues in this case—whether the City  
8 of San Jose fulfilled its statutory collective bargaining obligations before placing an initiative measure  
9 on the June 2012 ballot after impasse on October 31, 2011—the City swore that it completely fulfilled  
10 its obligations and that it met with Relator and engaged in additional bargaining and mediation in  
11 December 2011, January 2012, and February 2012. (RJN Ex. 14, Undisputed Facts, ¶¶ 23, 25, 27;  
12 RJN, Ex. 15, Gurza Decl. ¶ 24, RJN; Answer, ¶¶ 34; Decl. of Sakai, ¶ 4.) However, the Parties'  
13 stipulations omit facts demonstrating meet and confer compliance, and directly contradict those facts,  
14 capitulating in a final “stipulated conclusion” that “[t]he City's failure [to continue to meet and confer]  
15 is deemed to be a procedural defect significant enough to declare null and void Resolution 76158,  
16 which placed Measure B on the ballot.” (Stipulated Facts, ¶¶ 16-17, 23; Stipulated Conclusions, ¶¶  
17 1-3.) This stands in stark contrast to the City's prior position in this case: “SJPOA claims that the  
18 City did not complete the meet and confer process before placing Measure B on the ballot. The  
19 undisputed facts and settled legal principles compel the conclusion that, as a matter of law, the  
20 SJPOA's position is without merit.” (City's Memo IOT SJPOA's App. for Leave to Sue in *Quo*  
21 *Warranto*, p. 8, RJN, Ex. 13.) On April 12, 2016, Proposed Intervenors filed a Notice of Intention to  
22 Move to Vacate Judgment and for Further Trial or New Trial, pursuant to Code of Civil Procedure  
23 section 657 et seq. and California Rules of Court Rule 3.1600.

#### 24 **IV. STANDING OF PROPOSED INTERVENORS.**

25 “A long line of cases has established a ‘nonstatutory’ form of intervention whereby one who  
26 is legally aggrieved by a judgment may become a party to the record and obtain a right to appeal by  
27 moving to vacate the judgment pursuant to Code of Civil Procedure section 663.” (*Lippman v. City*  
28

1 of L.A. (1991) 234 Cal.App.3d 1630, 1633; see also *County of Alameda v. Carleson* (1971) 5 Cal.3d  
2 730, 736-737.) Further, the court in *Lippman* held, “we see no reason why, if an aggrieved person  
3 can become a party to the record by moving to vacate the judgment [pursuant to section 663], he or  
4 she cannot accomplish the same result by moving for a new trial under Code of Civil Procedure  
5 section 657.” (*Lippman, supra*, 234 Cal.App.3d at p. 1633; see also *Shaw v. Hughes Aircraft Co.*  
6 (2000) 83 Cal.App.4th 1336, 1342 [nonparty who moves for new trial permitted to appeal as if he  
7 were a party].)

8 Intervenor Constant is a “party aggrieved” under Code of Civil Procedure section 657 because  
9 his personal rights are injuriously affected by the stipulated judgment. (*Carleson, supra*, 5 Cal.3d at  
10 p. 737; *Shaw, supra*, 83 Cal.App.4th at p. 1342; *Plaza Hollister, supra*, 72 Cal.App.4th at p. 13;  
11 *Paulson v. Abdelnour* (2006) 145 Cal.App.4th 400, 417.) Furthermore, “it is essential to the integrity  
12 of the initiative process embodied in article II, section 8, that there be someone to assert the state’s  
13 interest in an initiative’s validity on behalf of the people when the public officials who normally assert  
14 that interest decline to do so,” as occurred in this case. (*Perry v. Brown* (2011) 54 Cal.4th 1116,  
15 1126.) Intervenor Constant is: a direct beneficiary of Measure B, whose pecuniary interests are at  
16 stake; a former member of the City Council directly involved in development of Measure B and its  
17 placement on the ballot; as well as one of the San Jose voters who in 2012 supported Measure B,  
18 expending resources in his efforts including money and many man-hours, and voted to enact Measure  
19 B, and who has a right to appear in the case pursuant to *Perry*, now that the City has abandoned its  
20 defense of Measure B. (Decl. of Constant; Suppl. Decl. of Constant; 3d Decl. of Constant.) In cases  
21 concerning the validity of an initiative, courts have held interest groups and individual supporters of  
22 a measure qualify as “aggrieved” parties. (*Paulson, supra*, 145 Cal.App.4th at pp. 417-418; see also  
23 *Simac Design, Inc. v. Alciati* (1979) 92 Cal.App.3d 146, 151-153.)

## 24 **V. GROUNDS DEMANDING NEW TRIAL.**

### 25 **A. The Court Enjoys Plenary Power To Grant A New Trial In The Interest of Justice.**

26 The trial court enjoys plenary power in ruling on a motion for a new trial. (*Barrese v. Murray*  
27 (2011) 198 Cal.App.4th 494, 504.) That authority establishes “the power of the judge to do justice”  
28 in ordering a new trial, and to prevent the miscarriage of justice as the court exercises its supervisory

1 role in managing a case. (*Shaw v. Pacific Greyhound Lines* (1958) 50 Cal.2d 153, 159; *Malkasian v.*  
2 *Irwin* (1964) 61 Cal.2d 738, 747; see also *Hoel v. Los Angeles* (1955) 136 Cal.App.2d 295, 307.)  
3 ““The powers of a trial court in ruling on a motion for new trial are plenary. The California Supreme  
4 Court has held that the trial court, in ruling on a motion for new trial, has the power “to disbelieve  
5 witnesses, reweigh the evidence, and draw reasonable inferences therefrom contrary to those of the  
6 trier of fact’ [citation], that the court sits as ‘an independent trier of fact” [citation] and that it must  
7 “independently assess [ ] the evidence supporting the verdict” [citation]. The trial judge “has ‘to be  
8 satisfied that the evidence, as a whole, was sufficient to sustain the verdict; if he was not, it was not  
9 only the proper exercise of a legal discretion, but his duty, to grant a new trial.” [Citation.]’ (*Barrese*  
10 *v. Murray* (2011) 198 Cal.App.4th 494, 503.” (*David v. Hernandez* (2014) 226 Cal.App.4th 578, 588.)

11 Finally, “courts have fundamental inherent equity, supervisory, and administrative powers, as  
12 well as inherent power to control litigation before them.” (*Rutherford v. Owens-Illinois, Inc.* (1997)  
13 16 Cal.4th 953, 967; see also *Stephen Slesinger, Inc. v. Walt Disney Co.* (2007) 155 Cal.App.4th 736,  
14 758 [California courts received “broad inherent power” from their creation by article VI, section 1 of  
15 the California Constitution]; *Plaza Hollister, supra*, 72 Cal.App.4th at p. 15 [inherent power of court  
16 to set aside void judgments]; *Blueberry Properties, LLC v. Chow* (2014) 230 Cal.App.4th 1017, 1021  
17 [C.C.P. § 128 codifies the inherent power of the court to achieve justice].)

18 B. Prejudicial Irregularity In Proceedings (C.C.P. § 657(1)).

19 I. *The City lacks authority to stipulate to the repeal of Measure B.*

20 An initiative “may be repealed or amended by the legislative body having jurisdiction so to  
21 do, i.e., by the people legislating directly ... The fact that accomplishment of amendment or repeal  
22 through the initiative process may be cumbersome or difficult ... is merely a characteristic of the kind  
23 of legislative system the Constitution of this state has ordained.” (*Higgins v. Santa Monica* (1964)  
24 62 Cal.2d 24, 30.) The City’s stipulation that Measure B is invalid was highly irregular and  
25 prejudicial. The Parties failed to advise the Court of the unprecedented route they were taking to rid  
26 themselves of Measure B, thus depriving the Court of the opportunity to properly perform its duty  
27 to preserve Measure B, if doubts can be resolved in its favor. (2<sup>nd</sup> Decl. of Leoni, ¶ 14.)

1           There is no case that has ever permitted the invalidation and repeal of an initiative by the  
2 legislative body, absent express authority in the initiative itself. By so doing, the Parties usurped the  
3 authority of the Court to determine the validity of Measure B under the standard that requires it to  
4 preserve Measure B, if possible. (See *Perry v. Brown, supra*, 52 Cal.4th at p. 1155 [“[T]he validity  
5 or proper interpretation of a challenged state constitutional provision or statute is, of course,  
6 ultimately a matter to be determined by the courts, not the Attorney General. (Cf., e.g., *Lockyer v.*  
7 *City and County of San Francisco* (2004) 33 Cal.4th 1055.)”].)

8           Courts have uniformly rejected all attempts by a legislative body to rid itself of inconvenient  
9 initiative legislation other than by a vote of the people: legislative bodies cannot secure the  
10 invalidation of an initiative through a “friendly action for declaratory relief” (*City of Santa Monica v.*  
11 *Stewart* (2005) 126 Cal.App.4th 43, 69 [“We agree with [Intervenor]: ‘Permitting the validity of a  
12 voter-enacted initiative to be determined in a lawsuit in which both parties and their attorneys not  
13 only believe, but have affirmatively stated in prior judicial proceedings, that the measure is  
14 unconstitutional makes a mockery of ‘one of the most precious rights of our democratic process’  
15 (*Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 591 [135 Cal. Rptr.  
16 41, 557 P.2d 473]) and breeds disrespect for the integrity of the judicial process.” ]); through  
17 legislation that undercuts the purpose of the initiative (*People v. Kelly* (2010) 47 Cal.4th 1008, 1025  
18 [“We begin with the observation that ‘[t]he purpose of California’s constitutional limitation on the  
19 Legislature’s power to amend initiative statutes is to “protect the people’s initiative powers by  
20 precluding the Legislature from undoing what the people have done, without the electorate’s  
21 consent.[Citations.]”], citing *Proposition 103 Enforcement Project v. Quackenbush* (1998) 64  
22 Cal.App.4th 1474, 1483)]; by re-enacting a referred law on a temporary basis (*Lindelli v. Town of*  
23 *San Anselmo* (2003) 111 Cal. App. 4th 1099); or by changing other laws to subvert the impact of a  
24 referendum (*County of Kern v. T.C.E.F., Inc.* (April 5, 2016, No. F070813) 2016 Cal. App. LEXIS  
25 268.)

26                           2.       *The City shirked its obligation to defend Measure B, or provide for its defense.*

27           These proceedings are also irregular because the City shirked its duty to defend Measure B.  
28 Local governments have a duty to defend initiatives adopted by voters. (*Perry v. Brown, supra*, 52

1 Cal.4th at 1127 & 1168 (Kennard, J. concurring) [“To give those same state officials sole authority  
2 to decide whether or not a duly enacted initiative will be defended in court would be inconsistent with  
3 the purpose and rationale of the initiative power, because it would allow public officials, through  
4 inaction, effectively to annul initiatives that they dislike.”]; *Lockyer v. CCSF* (2004) 33 Cal.4th 1055,  
5 1082; *Building Indus. Assn. v. City of Camarillo* (1986) 41 Cal.3d 810, 822; *Arnel Dev. Co. v. City of*  
6 *Costa Mesa* (1980) 28 Cal.3d 511, 514, fn.3; see also *City of Burbank v. Burbank-Glendale-Pasadena*  
7 *Airport Auth.* (2003) 113 Cal.App.4th 456; *Bramberg v. Jones* (1999) 20 Cal.4th 1045.) This is rooted  
8 in the principle that the constitutionally reserved initiative power is greater than that of the legislative  
9 body, and give the people the final legislative word, a limitation upon the power of the Legislature.  
10 (*Rossi v. Brown* (1995) 9 Cal.4th 688, 716.)

11 If the City did not to defend, the City was obligated to provide for its defense by other parties.  
12 It acted in a highly irregular manner in opposing intervention. (2nd Decl. of Shamos; See *Perry v.*  
13 *Brown, supra*, 52 Cal.4th at pp. 1158-59 [“[T]he Attorney General [who declined to defend an  
14 initiative] does not have authority to prevent others from mounting a defense on behalf of the state’s  
15 interest in the validity of the measure.”].) For example, in *City of Burbank v. Burbank-Glendale-*  
16 *Pasadena Airport Auth., supra*, 113 Cal.App.4th 456, the City solicited an initiative supporter to  
17 defend an initiative that both the City and the defendant believed was *ultra vires*. (*Id.* at p. 471; see  
18 also *Redevelopment Agency v. City of Berkeley* (1978) 80 Cal.App.3d 158, 165 [intervention of  
19 initiative supporters created requisite controversy in action for declaratory relief].) The City was  
20 obligated to agree to intervention of Intervenors so the voters’ interests would be defended. (*Perry*  
21 *v. Brown, supra*, 52 Cal.4th at p. 1149.)

22 3. *The Parties deprived the Court of the opportunity to properly perform its duty*  
23 *to preserve Measure B, if possible.*

24 Not only did the Parties violate the Constitution by stipulating to the invalidation of Measure  
25 B, the Parties did not advise the Court of the rock-solid case law that forbids the City’s actions, thus  
26 depriving the Court of its opportunity to perform its duties properly. In a classic statement of this  
27 Court’s obligations with regard to a challenge to the initiative power, the California Supreme Court  
28 in *Associated Homebuilders, supra*, 18 Cal.3d at p. 591, stated:

1 The amendment of the California Constitution in 1911 to provide for the initiative and  
2 referendum signifies one of the outstanding achievements of the progressive movement of the  
3 early 1900's. Drafted in light of the theory that all power of government ultimately resides in  
4 the people, the amendment speaks of the initiative and referendum, not as a right granted the  
5 people, but as a power reserved by them. Declaring it "the duty of the courts to jealously  
6 guard this right of the people" (*Martin v. Smith* (1959) 176 Cal.App.2d 115, 117 [1 Cal.Rptr.  
7 307]), the courts have described the initiative and referendum as articulating "one of the most  
8 precious rights of our democratic process" (*Mervynne v. Acker, supra*, 189 Cal.App.2d 558,  
9 563). "[It] has long been our judicial policy to apply a liberal construction to this power  
10 wherever it is challenged in order that the right be not improperly annulled. If doubts can  
11 reasonably be resolved in favor of the use of this reserve power, courts will preserve it."  
12 (*Mervynne v. Acker, supra*, 189 Cal.App.2d 558, 563-564; *Gayle v. Hamm, supra*, 25  
13 Cal.App.3d 250, 258.)

14 Also, the Court may accept stipulations of counsel that have been made advisedly and after  
15 due consideration of the facts, but the Court "cannot surrender its duty to see that the judgment to be  
16 entered is a just one, nor is the court to act as a mere puppet in the matter." (*Cal. State Auto. Assn.*  
17 *Inter-Ins. Bureau, supra*, 50 Cal.3d at p. 664, quoting *City of Los Angeles v. Harper* (1935) 8  
18 Cal.App.2d 552, 555; see also *Plaza Hollister, supra*, 72 Cal.App.4th at pp. 12-13.) Courts further  
19 have the authority to reject a stipulation that is contrary to public policy, or one that incorporates an  
20 erroneous rule of law. (*California State Auto., supra*, 50 Cal.3d at p. 664; *Plaza Hollister, supra*, 72  
21 Cal.App.4th at p. 12.) The Parties denied to the Court the opportunity to evaluate the facts in this  
22 case and the Parties stipulations in light of the Court's obligation to preserve the initiative power, and  
23 to ensure the judgment proposed by the Parties was legal and consistent with public policy. This  
24 issue in this case is not black and white, like the Parties suggest by their citation to *Seal Beach Police*  
25 *Officers Assn. v. City of Seal Beach, supra*, 36 Cal.3d 591, in their stipulations. In *Seal Beach*, the  
26 parties did not engage in the meet and confer process at all. In this case, the question is whether they  
27 met and conferred enough. (Op. Cal. Atty. Gen., *supra*, at p. 4 ["[I]t is clear from the parties'  
28 submissions and recitations of the relevant facts that the parties did in fact meet and/or exchange  
proposals on numerous occasions in 2011 and early 2012 regarding ... the potential ballot initiative  
that would become Measure B."].)

4. *The Parties prejudicially failed to serve their stipulations on Intervenors.*

On March 7, 2016, Intervenor Constant told the City of his intent to intervene in this action.  
(Supp. Decl. of Constant, ¶ 3.) The very next day, in violation of open meeting laws (2<sup>nd</sup> Decl. of  
Leoni, Ex. 1; Decl. of Adam, ¶ 2; Decl. of Sakai, ¶ 5), the City executed Stipulated Facts and Proposed  
Findings, Judgment and Order and Proposed Writ in *Quo Warranto* intended to annul Measure B.

1 Relator then hand-delivered the stipulations to the Court. (Decl. of Adam, ¶ 2.) Intervenors filed their  
2 application to intervene on March 9, 2016. Thereafter the Parties failed ever to serve the stipulations  
3 on Intervenors. (Decl. of Sakai; Decl. of Adam.) They even failed to serve them with their oppositions  
4 to Intervenors’ application to intervene despite the fact they directly relied on the stipulations in their  
5 oppositions. (2<sup>nd</sup> Decl. of Leoni, ¶ 8.) All papers opposing a motion must be filed with the court and  
6 served on all other parties at least nine court days before the hearing date. (See Cal. Code Civ. Proc.  
7 § 1005(b), Cal. Rules of Court, rule 3.1300(a).) The Parties failed to comply with this mandate. (See  
8 *Gordon v. Gordon* (1956) 145 Cal.App.2d 231 [new trial granted for failure to serve opposing party].)

9         Additionally, the Santa Clara County Superior Court has enacted into its Local Rules the Code  
10 of Professionalism (“Prof. Code”). (“Standing Order Re Santa Clara County Bar Association Code  
11 of Professionalism,” Santa Clara County Superior Court, Sept. 30, 1992.) Section 18 requires lawyers  
12 to “conduct themselves with clients, opposing counsel, parties and the public in a manner consistent  
13 with the high respect and esteem which lawyers should have for the courts, the civil and criminal  
14 justice systems, the legal profession and other lawyers.” Further, the “timing and manner of service  
15 of papers should not be calculated to disadvantage or embarrass the party receiving the papers.” (Prof.  
16 Code § 5.) None of this occurred, severely prejudicing Intervenors and depriving them of the  
17 opportunity to bring their motion to intervene to the Court’s attention prior to its signing and filing of  
18 the judgment and issuance of the writ of *Quo Warranto*. At the hearing on Intervenors’ application  
19 to intervene, the Court noted the stipulated judgment had already been signed, and later denied  
20 intervention. (2<sup>nd</sup> Decl. of Leoni, ¶ 13.)

21                 5.         *The Parties’ stipulations contradict sworn testimony.*

22         As set forth above, and at length in the memorandum of Intervenors Haug and SVTA, the City  
23 in a highly irregular action, stipulated to findings and conclusions contradicting sworn evidence in  
24 the case, which evidence would support judgment upholding Measure B. (See also Decl. of Sakai, ¶  
25 4 [“The negotiations between the City and its labor organizations over the terms of Measure B began  
26 in June of 2011 and ended in March of 2012.”].) The stipulations also contradict the City’s  
27 consistently held position Measure B was properly enacted. In addition, the factual stipulations do  
28 not support the judgment because, while incomplete, they demonstrate the City continued to bargain

1 with Relator from December 2011 through February or March 2012. (Decl. of Sakai, ¶ 4.) As a result  
2 of these irregularities, judgment was entered, severely prejudicing Intervenors by: nullifying Measure  
3 B and the voters' exercise of their constitutional initiative and First Amendment rights; wresting  
4 control of the City's pension system from San Jose voters; denying Intervenors their right to defend  
5 Measure B; denying Intervenor Constant the protections of Measure B; and leading the Court into the  
6 error of not performing its duty to uphold Measure B if possible.

7 C. Accident or Surprise (C.C.P. § 657(3)).

8 The Parties' stealth actions to execute stipulations that were kept away from the public, and  
9 secure entry of judgment, as discussed above and in the Parties' declarations of counsel just newly  
10 filed on April 21, 2016, were unknown to Intervenors, directly contrary to the City's public  
11 representation about the status of settlement discussions, and severely prejudicial, as described above.  
12 (2<sup>nd</sup> Decl of Leoni; 2<sup>nd</sup> Decl. of Shamos; 4<sup>th</sup> Decl. of Carson; Decl of Sakai; Decl of Adam.) In direct  
13 contradiction to the City's public representations, the Parties privately executed stipulations for entry  
14 of judgment annulling Measure B that are not contingent in any way, including on a November 2016  
15 ballot measure to repeal and supersede Measure B. Given the Parties' intentional non-disclosure of  
16 the existence or submission of their stipulations, the City's' public representations, the Parties'  
17 violations of Code of Civil Procedure section 1005(b) and the Professional Code of the Court,  
18 Intervenors could not have guarded against the surprise of having an erroneous judgment based on  
19 flawed stipulations entered against them while their application to intervene was pending.

20 D. Newly Discovered Evidence (C.C.P. § 657(4)).

21 Given the Parties' course of conduct described above, Intervenors could not in the exercise  
22 of reasonable diligence have learned of the Parties' stipulations, which entitles them to a new trial  
23 because: (1) the evidence was indisputably newly discovered by Intervenors after entry of judgment;  
24 (2) Intervenors exercised reasonable diligence in discovering it, given the Parties intentionally failed  
25 to inform them of the stipulations or serve them; and (3) it is material to the case. (2<sup>nd</sup> Decl. of Leoni;  
26 *Plancarte v. Guardsmark* (2004) 118 Cal.App.4th 640, 646.) "New discovered evidence" includes  
27 evidence that is willfully suppressed during the proceedings, as were the Parties' Stipulations. (Decl.  
28 of Sakai; Decl. of Adam; 4th Decl. of Carson, ¶ 3; 2nd Decl. of Shamos; *Sherman v. Kinetic Concepts*,

1 *Inc.* (1998) 67 Cal.App.4th 1152, 1261-62.) Despite monitoring the City’s website and the Court’s  
2 case information portal diligently, Intervenors could not have discovered that the City stipulated to  
3 facts, findings and conclusions on March 8, 2016, directly contradicting its prior declarations and  
4 position in this action. This resulted in severe prejudice to Intervenors, as described above. (2<sup>nd</sup> Decl.  
5 of Leoni; 2<sup>nd</sup> Decl. of Shamos; 4th Decl. of Carson.)

6 E. Insufficiency of Evidence; Decision Against Law (C.C.P. § 657(6)).

7 As discussed extensively above, the Court’s judgment is against law because the City was  
8 required to defend or provide for the defense of Measure B and abdicated its duty to do so. The City  
9 was without authority to stipulate to the invalidation of Measure B, an initiative amendment to the  
10 City Charter. Without valid stipulations, the Court’s Judgment is without evidentiary support, against  
11 law, and cannot stand. (See *Hoffman-Haag v. Transamerica Ins. Co.* (1991) 1 Cal.App.4th 10, 15.)

12 It is the duty of the trial judge to grant a new trial when he or she believes the evidence to be  
13 contrary to its findings. As detailed at length in the Memorandum of the Taxpayer Intervenors, City’s  
14 sworn statements and pleadings herein are inconsistent with the Parties’ stipulated facts, findings, and  
15 conclusions, and do not support the Stipulated Judgment. (*Yarrow v. State* (1960) 53 Cal.2d 427,  
16 434-35.) The judgment states: “The City’s failure to [meet and confer after impasse on October 31,  
17 2011] is deemed to be a procedural defect significant enough to declare null and void Resolution  
18 76158, which placed Measure B on ballot (sic).” Yet the Parties stipulated facts, while incomplete,  
19 reflect negotiations through February 2012 (¶17); the City’s own sworn and un-contradicted  
20 testimony reflects the same with additional meetings in December 2011 and January 2012; the  
21 recently filed declaration of the City’s counsel reflect negotiations through March 2012. (Decl. of  
22 Sakai, ¶ 4.) This evidence supports the conclusion that the City complied with MMBA in submitting  
23 Measure B to the voters, in contradiction to the stipulated judgment entered in this action.

24 Also, the Court is required to uphold Measure B, if possible, and resolve doubts in favor of  
25 upholding the initiative. In light of this obligation, the Court must “be satisfied that the evidence, as  
26 a whole, was sufficient to sustain the [judgment]; if he was not, it was not only the proper exercise of  
27 a legal discretion, but his duty, to grant a new trial.” (*Barrese v. Murray, supra*, 198 Cal.App.4th at  
28 p. 503, citing *People v. Lum Yit* (1890) 83 Cal. 130.) Granting a new trial would give the Court an

1 opportunity to re-examine the judgment in light of the evidence in the case and its duty to jealously  
2 guard the initiative power, and resolve all doubts, including whether the requirements of the MMBA  
3 were satisfied, in favor of upholding Measure B.

4 F. Errors in Law (C.C.P. § 657(7)).

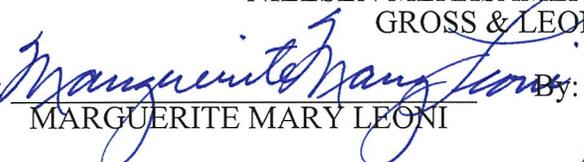
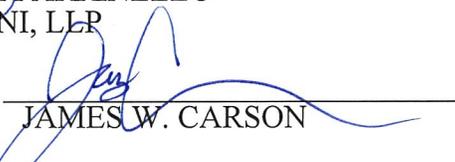
5 The Judgment was entered as a result of the City's violation of its constitutional duty to defend  
6 the Measure B. It is also contrary to the requirements of the MMBA. (See, extensive legal argument  
7 that the City fully complied with MMBA in the City's Memo IOT SJPOA's App. for Leave to Sue in  
8 *Quo Warranto*, p. 8, RJN, Ex. 13. ) The Court was denied the opportunity to rule on these issues  
9 under the appropriate standards of judicial deference to the initiative process, because they were not  
10 raised by the Parties, who also opposed Intervenor so they could not raise them. These errors are  
11 clearly prejudicial because they resulted in the nullification of Measure B. A new trial is appropriate  
12 to permit the Court to comply with its own duties with regard to preserving and protecting the  
13 constitutional initiative right. (*Collins v. Sutter Mem. Hosp.* (2011) 196 Cal.App.4th 1, 6.)

14 **VI. CONCLUSION.**

15 The conduct of the Parties in this action prevented the Court from ensuring that the stipulations  
16 of the Parties were lawful and the stipulated judgment in conformity with law, the evidence, and the  
17 policy of this State to uphold an initiative by endeavoring to resolve all doubts in its favor. These  
18 proceedings were unfair and prejudicial to San Jose voters. For all the reasons stated above, the  
19 judgment should be vacated, and a trial held on the important issues presented. Alternatively, the  
20 parties should abide by their agreement to stay these proceedings and place on the November 2016  
21 ballot a measure for the repeal of Measure B to be superseded by a Charter Amendment consistent  
22 with the Settlement Framework they have negotiated.

23 Dated: April 22, 2016      Respectfully submitted,

24 NIELSEN MERKSAMER PARRINELLO  
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26 By:  By:   
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